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In the

Supreme Court of the United States

No. 40

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

On Writ of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The citations of opinions of the lower courts are adequately set forth in Petitioner's Brief, page 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief, page 2.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in sustaining the standard of review on habeas corpus applied by Judge SMITH in his decision on remand?

2. Did the Court of Appeals err in holding that the facts and circumstances surrounding petitioner's confessions were not such as to render them involuntary and inadmissible at his trial?

STATEMENT OF THE CASE

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by petitioner Harold Rogers in her husband's liquor store. Earlier that day petitioner stole a revolver and cartridges from the home of his nephew. (R. 285) On entering the store, he asked for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, petitioner struck her on the head and fired five shots at her. He then removed the contents of the cash register and drove off. (R. 286)

On being questioned by his nephew, petitioner denied stealing the gun whereupon both men went to police headquarters and reported that it had been stolen by persons unknown. Thereafter petitioner filed off the serial numbers to conceal its identity. (R. 286).

On January 9, 1954, petitioner was arrested on charges of Carrying Revolver, Attempted Robbery, Breaking and Entering and Theft, committed that day at the Travelers Hotel. (R. 483) On being questioned he gave a signed statement claiming that he won the gun in a "crap game" that afternoon, but the following day admitted stealing it from his nephew's home. (R. 286)

On January 13, 1954, petitioner was presented in the City Court of New Haven on the Travelers Hotel charges and was bound over to the Superior Court and in default of bail was lodged in the county jail.

On the morning of January 30, 1954, ballistics tests conducted by the state police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in petitioner's possession. Thereupon petitioner was brought to the office of the state's attorney for questioning. Detectives started to question him at about 2 P. M. (R. 195) and there were several intermissions and interruptions. At all times Rogers was seated in a comfortable armchair. (R. 42) He was invited to eat and

did eat and have coffee; and in the evening he was again invited to eat but chose merely to take coffee. (R. 34) He smoked his own cigarettes and those of the officers. When he first expressed a desire to smoke, one handcuff was released and thereafter one hand remained free. (R. 42)

Petitioner makes no claim that physical violence or threats of physical violence were used against him and acknowledges that at no time did the questioning by the police confuse him. (R. 33)

At 8 P. M. Captain Eagan of the New Haven Police Department, came in to question Rogers. Eagan who was acquainted with Rogers from a prior arrest, told him that he did not have to say anything (R. 28) and that he could not promise him any benefit or reward if he did say anything. (R. 385) During the interrogation, Eagan informed Rogers that Mrs. Rogers would have to be questioned in order to ascertain whether he had said anything to her about the murder and he assured Rogers that during her questioning the two state wards who were then living with them would be taken care of at the Children's Center. (R. 199, 316) At about 9 P. M. Eagan made a pretended call on a dead wire to hold a policewoman in readiness to bring Mrs. Rogers down for questioning. During the next hour Rogers was not questioned at all. (R. 243) At about 10:30 P. M. Rogers said he had been drinking that night (R. 200) and then proceeded to confess. Thereupon a court reporter was summoned and Rogers gave his confession while the reporter recorded it stenographically. (R. 325-346) The confession consisted of thirty typewritten pages. At the outset Rogers related, largely in narrative form (R. 325-326), an elaborately fabricated and detailed story of (1) a six months adulterous relationship between the decedent and himself; and (2) a claim of provocation for the murder based upon profane and abusive remarks by the decedent just before the shooting. Throughout his confession Rogers answered questions freely and without hesitancy. On its completion shortly after 12 P. M. Rogers made oath to its truth.

The next day some seventeen hours later, Rogers gave a second confession to the coroner at his official inquest. (R. 347-369) The coroner fully informed Rogers of his right to counsel and his right to remain silent and that anything he said might be used against him. (R. 347-348) Rogers acknowledged his awareness of his rights and expressly declined the services of counsel.

Rogers was forty-eight years old, highly intelligent, and the brother of a New Haven police officer. (R. 319) He had been arrested and interrogated by police on at least four occasions prior to the questioning on January 30th; the first time in connection with a New York offense, the second after his arrest for violation of parole, the third for a liquor offense in 1949 in New Haven, the fourth on his arrest on January 9th for the Travelers Hotel robbery. (R. 195-196)

STATE COURT PROCEEDINGS

The Grand Jury returned an indictment charging Rogers with murder in the first degree in the perpetration of a robbery. Rogers was represented by counsel at all stages of the proceedings.

During the course of his trial to the jury, petitioner invoked his right to the so-called "orthodox" rule for testing the admissibility of confessions. Accordingly, the court excused the jury and heard evidence at great length as to the circumstances surrounding his confession to the police. At this preliminary hearing, Rogers testified and called witnesses in his own behalf, and the court excluded questions concerning the truth or falsity of the confession. The trial judge made thirty-seven express findings of fact (R. 314-317), including the specific finding that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney." Upon the conclusion of this preliminary hearing and after arguments by counsel, the court ruled that the confession was freely and voluntarily made. After this finding of voluntariness by the court, the jury in the course of the trial considered the same facts, claims and circum-

stances surrounding the making of the confession in determining its weight and credibility. A similar hearing in the absence of the jury was had upon the second confession to the coroner. Upon testimony produced at this hearing, the court specifically found that (1) "the accused did not ask to be represented by counsel" and (2) "the accused voluntarily chose to testify after hearing from the coroner that he was entitled to counsel and that anything he said might be used against him". (R. 319) The court concluded that this second confession also was voluntary.

There was substantial evidence other than the confession connecting Rogers with the murder, notably the ballistics evidence, possession of the murder weapon on the night of the murder (R. 56), his false report to the police that the gun had been stolen by persons unknown (R. 286); his possession of the murder gun at the time of his arrest (R. 196), his contradictory statements, first claiming that he won the gun in a "crap game" and afterwards admitting that he had in fact stolen it on the day of the murder. (R. 285, 286) In defense, Rogers presented witnesses merely for the purpose of mitigating the penalty (R. 312), but offered no evidence to controvert the truth of his confession of this murder. (R. 317) The jury returned a verdict of guilty of murder in the first degree.

On appeal, the Supreme Court of Errors considered the circumstances surrounding the confessions and held that they were freely and voluntarily given and affirmed the conviction (R. 219) (O'SULLIVAN, J., dissenting). The ensuing petition for certiorari was denied by the Supreme Court of the United States.

FEDERAL PROCEEDINGS IN HABEAS CORPUS

Petitioner thereupon instituted this habeas corpus proceeding in the federal court below. Judge SMITH of the district court made no examination of the state record or of the factual findings therein contained (R. 388), but instead conducted a hearing *de novo* for the purpose of making his own findings of historical fact in the

erroneous belief that "On habeas corpus, the federal court *must* make its own determination of the underlying facts." (R. 178) (emphasis added) At that hearing Rogers testified that Captain Eagan had informed him that "I didn't have to say nothing to him" (R. 28); and three officers testified that Rogers had made no request for counsel at any time during his interrogation (R. 41, 58, 66), thereby reinforcing the record testimony of Captain Eagan. Judge SMITH disregarded petitioner's acknowledgement that he was told of his right to "say nothing" (R. 176), but on the issue of request for counsel he chose to believe petitioner and to repudiate the testimony of the four officers of the law (including Captain Eagan whom he had never seen) (R. 176) on the theory that the officers' recollection would naturally "coincide with the version they must subconsciously prefer." (R. 433). Judge SMITH thereupon ordered the sentence vacated. (R. 176-180)

On respondent's motion for rehearing and to amend the findings, Judge SMITH refused to receive or consider the state trial record or the factual findings of the trial judge on the admissibility of the confession and denied the motion for rehearing. (R. 194-196)

On appeal, the Court of Appeals vacated the judgment of the district court on the ground that Judge SMITH had failed "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions" (R. 397); and on remand it directed that "Unless the judge below shall find in the record thus before him material which he deem to constitute 'vital flaws' and 'unusual circumstances' within the meaning of *Brown* vs. *Allen*, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court. *Brown* vs. *Allen*, at pages 507-8." (R. 398-399)

On petition for rehearing, the Court of Appeals pointed out that this limitation to the historical facts as found by the state court would not preclude the district court from hearing additional

"evidence material on the constitutional issue which the state court had excluded or as to which it had made no finding" (R. 419), even though no vital flaw is found in the state proceedin.

Petitioner's request to this Court for certiorari was denied per curiam with a short opinion. 357 U. S. 220. (R. 417)

On remand to the district court, the respondent moved to disqualify Judge SMITH which motion was denied. (R. 418)

The district court thereupon received the entire transcript of the state proceedings (Record on Appeal, 1043-1714), the findings made by the state trial court (R. 314-320), the transcript of the preliminary hearing on the issue of the voluntariness of the confessions (Record of Appeal, 967-1041), the state court appellate record (R. 278-324) and Rogers' two confessions. (R. 325-369)

With the complete record thus before him, Judge SMITH acknowledged that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (R. 434) and that he could not find "any lack of fair hearing or procedural due process, or other basis for this court in its judicial discretion to consider evidence outside the state court record." (R. 432) Accordingly, he used the historical facts as found by the state court as the basis for his consideration of the constitutional issues and thereupon concluded that the writ should be discharged. (R. 435) Petitioner thereafter moved for additional findings, which motion was denied by Judge SMITH. (R. 446)

On appeal, the Court of Appeals affirmed, in an opinion by Judge MOORE in which Judge SWAN joined, with CLARK, C. J. dissenting. (R. 452) The court held that the procedure adopted by Judge SMITH on remand was in full accord with *Brown* vs. *Allen* and with this Court's per curiam opinion (R. 458), and found, after reviewing all of the circumstances, that neither confession was the product of coercion. (R. 464)

This petition for writ of certiorari was granted on February 23, 1960. (R. 489)

ARGUMENT

I

THE DECISIONS OF THE COURTS BELOW ARE CORRECT

1. Judge Smith Employed a Broad and Liberal Standard in His Review of This Petition on Remand.

On remand, Judge Smith proceeded for the first time to examine the full state trial record. (R. 427) This record included not only the findings of the court as to the admissibility of the confessions and the transcript of the preliminary hearings thereon, but also the petitioner's claims in opposition to the admission of the confessions, the petitioner's claims of proof and requests to charge as well as the testimony presented by the State and the defense, together with the confessions themselves. (R. 314-320, Record on Appeal 967-1041, R. 278-324, R. 325-369, Record on Appeal 1043-1714)

Judge Smith's objective was to determine "whether that record shows any lack of fair hearing or procedural due process or other basis for this Court in its judicial discretion to consider evidence outside the state court record." (R. 432) He was well aware that this Court's opinion "makes it plain" that a federal judge, after review of the state record, may decide to take testimony *"even though no vital flaw is necessarily found."* (R. 430-431) (emphasis added) His opinion is abundantly clear that he did not consider a finding of "vital flaw" an indispensable prerequisite to a *de novo* hearing. He firmly felt, however, that he must adopt some standard to govern the exercise of his discretion to conduct a retrial: "whether we call it a vital flaw or unusual circumstances or a substantial ground for exercise of judicial discretion in granting a hearing, *something* must appear upon

examination of the state record to require a trial *de novo* of the fact issues." (R. 430) (emphasis added)

The majority of the Court of Appeals recognized the liberal test adopted by Judge SMITH:

> "Judge SMITH's own understanding of the broad scope of his power and review upon the remand is vital to a proper determination of this appeal. He did not regard himself as foreclosed from exercising his independent judgment or as in the role of a rubber stamp upon state court conclusions. To him 'the question here is whether on review of the full trial court record (which he had not had before him when he delivered his previous opinion) testimony should be considered in a trial *de novo*.' He knew that he was privileged to 'take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and (that he) must independently determine whether the conviction may constitutionally stand' but that he might 'not substitute his judgment on factual issues fairly tried (*i.e.* where no vital flaw exists) before a state court on similar evidence.'" (R. 455-456)

Under these broad standards, Judge SMITH examined the state record and found that there was no unfairness or lack of due process and no circumstances warranting rejection of the historical facts as specifically found by the state trier or calling for the exercise of his discretion to make new factual findings. (R. 432-434) Accordingly he proceeded to make his own independent evaluation of these facts, and upon these facts based his constitutional determination that petitioner's rights were not violated and that the writ should be discharged. (R. 435)

Notwithstanding Judge SMITH's finding that "the issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge" (R. 434), petitioner contends that he

should have made "a fresh federal inquiry into the underlying facts." (Petitioner's Brief, p. 36). Petitioner asserts, even though Judge SMITH concluded that "there was no unfairness or lack of due process" in the state court's consideration of Rogers' credibility (R. 433), that he should have conducted a retrial to redetermine credibility.

In short, petitioner claims that the writ of habeas corpus vests a federal court with unbounded and unbridled discretion to hold a trial *de novo* of the factual issues; that a federal judge may at will and without legal standards to guide or govern him, repudiate basic historical facts acknowledged by him to have been fairly found by the state tribunal.

If petitioner's position were to prevail, full hearings and the remaking of historical facts would be required in all cases, even where, as here, the federal judge certifies that the facts have been fairly found and nothing appears to warrant a retrial. Judge CLARK, contrary to all his previous utterances, seems to adopt this view that the federal court should be permitted to remake the historical facts on the ground that the ensuing product would be superior to the state's factual findings. (R. 480)

Such a rule would overturn *Brown* vs. *Allen*, 344 U. S. 443 (1953) and all the host of cases that have consistently held that the constitutional issue must be determined on the historical facts found in the state record. It would repeatedly present the situation posed by the Court of Appeals:

> "Is a convicted state prisoner, having been unsuccesful before a jury of his peers or a judge, to be able via habeas corpus to have his case re-tried by some federal judge in the district of his incarceration and, if so, is the federal judge to have the right to re-determine the historical facts? . . . Take a single case. It is tried and appealed twice in a state court, certiorari is denied. Three, four or ten years later, a federal judge or appellate court takes a different view and decides to believe witness A instead of witnesses B and C

as to coercion. Would it not have been better to have had the case tried originally before a federal judge so that the time and expense of the state proceedings could have been avoided?" (R. 457)

To avoid such a chaotic condition, respondent respectfully submits that *some* standard, *some* test should be applied by a federal court before it rehears facts *de novo*. The procedure carefully formulated by Judge SMITH gives due recognition to the proper balance of federal-state relationships and yet protects the constitutional rights of the petitioner. His decision reveals that he fully understood that it was his duty independently to determine whether the petitioner's conviction may constitutionally stand and that the state court's findings, if fairly made, must serve only as the basis for the consideration of the constitutional issues. (R. 430) And on the other hand, if the subordinate findings of fact by the state trier were unfair or lacking in due process, he was free to order a hearing *de novo*. (R. 432) Thus, having first determined that the state trier fairly and conscientiously arrived at the factual findings, Judge SMITH properly exercised his own independent determination on the ultimate constitutional issue, by affirming the state trier's conclusion that the confessions were not coerced.

Brown vs. *Allen* clearly supports the procedure adopted by Judge SMITH as affirmed by the majority opinion below. Both opinions (Mr. Justice REED and Mr. Justice FRANKFURTER) stress that the resolution of the historical facts differs from the determination of the federal constitutional issue. If the state record does not contain the basic or historical facts; the federal judge may hold a hearing *de novo* to ascertain them before determining the constitutional issue. On the other hand, if the state record specifically sets forth all the necessary historical facts, the federal judge should use these facts to make an independent evaluation of the federal constitutional issue.

"In some cases the State court has held a hearing and rendered a decision based on specific findings of fact; there may

have been review by a higher State court which had before it the pleadings, the testimony, opinions and briefs on appeal. It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases." *Brown* vs. *Allen*, *supra*, at 504.

"On review here of state convictions, all those matters which are usually determined issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* vs. *Indiana*, 338 U. S. 49, 50-51 (1949).

As set forth in *Gallegos* vs. *Nebraska*, 342 U. S. 55, at 61 (1951), the federal courts have the duty to make the ultimate determination as to the voluntary character of the confession but "we give deference to the (state's) conclusions on disputed and essential issues of what actually happened." See, also, *Thomas* vs. *Arizona*, 356 U. S. 390 (1958); *United States* vs. *Murphy*, 2 Cir. 1955, 222 F. 2d 698, 706; *United States* vs. *Jackson*, 2 Cir., 1958, 256 F. 2d 7.

This is not to say, however, that even if the state record contains specific findings of historical facts, the federal judge may never hold a hearing *de novo*. Judge SMITH recognized that "if important evidence exists which the state trial court did not have before it, grounds would exist for exercise of discretion to retry the factual issues." (R. 432) Judge SMITH concluded that there was no need here to invoke this "additional evidence rule."

The liberal standard adopted by Judge SMITH is amply supported in the law. In *United States ex rel. Smith* vs. *Baldi*, 344 U. S. 561 at 569, this Court, in rejecting petitioner's contention that a plenary hearing should have been held, reaffirmed the principles of *Brown* vs. *Allen*, as follows:

"Not unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed of on the merits by

the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements. . . .

This review of the proceedings accords with our holding in Brown case."

"Nor has any territorial, state or federal court permitted habeas corpus to relitigate and redetermine issues already litigated to final appellate determination. To do so would cause litigation in criminal cases to be interminable and bring confusion into the administration of justice. A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies . . . and then supersede those remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them." *Palakiko* vs. *Harper*, *supra* at 80.

The broad scope of review adopted by Judge SMITH on remand and affirmed by the Court of Appeals is in full accord with this Court's *per curiam* opinion in denying certiorari. (R. 418) Petitioner claims that this Court's opinion constitutes a *sub silentio* reversal of the Court of Appeal's opinion and that this Court was in effect saying that, vital flaw or not, a federal judge has unlimited discretion to make fresh factual determinations and has unlimited discretion to take testimony as a means to reach such factual determinations.

We submit, however, that this Court was endeavoring to dispose of petitioner's contention that under the Court of Appeal's decision on remand, "The state record and only the state record is open to the District Court's view." (Reply to Respondent's Brief in Opposition to Petition for Certiorari, p. 2). In rejecting this claim, this Court stated that it reads the opinion of the Court of Appeals as holding that there are circumstances under which the district court may go outside the state record and take testimony, even

though no vital flaw exists. This Court did not use words either of rejection or modification of the Court of Appeal's unambiguous standards for federal review on habeas corpus. If this Court had intended to reject the Court of Appeal's interpretation of *Brown* vs. *Allen*, so as to permit unbridled range in the receipt of evidence on habeas corpus, it surely would have said so in no uncertain terms. From its language confirmatory of the Court of Appeal's opinion, the conclusion is impelled that this Court sanctioned the standards set forth in that opinion. As stated by Judge SMITH:

> "The sense of the Supreme Court's interpretation of the language of the Court of Appeals is that while the District Judge may take additional testimony not considered by the state trial court on constitutional issues, such as lack of due process by the use of coerced confessions, and make an independent determination of the facts, such as the voluntary character of confessions, and must independently determine whether the conviction may constitutionally stand, he may not substitute his judgment on factual issues fairly tried (*i.e.* where no 'vital flaw' exists) before the state court, on similar evidence." (R. 431-432).

The Court of Appeal's opinion, as applied by Judge SMITH, establishes a clearcut procedure on habeas corpus: A federal judge is duty bound to make an *independent appraisal* of the constitutional issues *irrespective of the "vital flaw" test*, and the state court's findings, if fairly made, serve merely as the basis for his consideration of the constitutional issues; only if the subordinate findings of fact by the state trier were unfair or lacking in due process or if there was a vital flaw in the state proceedings, is the federal court free to order a hearing *de novo*.

2. The Courts Below Were Justified in Accepting the State Court's Finding that Rogers did not Request Counsel.

Judge Smith specifically cites this issue as having been "fully and conscientiously tried by an experienced judge." (R. 434) The finding was based on the unassailable right of the trier to observe the witnesses and to pass judgment on their credibility. Rogers testified that he made a request for counsel to Captain Eagan during the evening (R. 245) as well as to another detective in the afternoon. (R. 241) In direct contradiction, Eagan testified that Rogers made no request for counsel during the evening (R. 233) and that the detectives[1] present did not report any such request having been made in the afternoon. (R. 237) Under these circumstances, Rogers' testimony cannot possibly be put into the category of an undisputed fact, as petitioner strives to do.[2] Here was a genuine conflict of evidence which the trial court was required to resolve. Resolution of this conflict depended on observation of Rogers and Eagan on the stand and judgment as to their credibility as witnesses. The court, at the conclusion of the preliminary hearing disbelieved Rogers and credited the testimony of Captain Eagan. Thus the finding has adequate support in the evidence and is properly inclusive of the entire period of questioning. As Judge Smith quite properly observed in his decision after remand, "There was no unfairness or lack of due process in the consideration of this issue in the state court." (R. 433)

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[1] It should be noted that at the hearing held by Judge Smith, these three detectives testified that Rogers in fact made no request for counsel at any time during the afternoon. (R. 41, 58, 66) Captain Eagan did not appear as a witness before Judge Smith.

[2] Even in absence of an explicit denial, under Connecticut law, "A fact is not undisputed merely because one or more witnesses testified to it and no one denied it, for the trial court may not give credence to the witnesses and that is for it to determine."

Maltbie, *Appellate Procedure*, 2nd Ed. 1957, Sec. 158.

Corvo vs. *Waterbury*, 141 Conn. 719, 724 (1954).

Clark vs. *Haggard*, 141 Conn. 668, 674 (1954).

At the first hearing on habeas corpus, Judge SMITH had overturned the ruling of the state court on the basis that "such a request seems most probable." (R. 176) But his finding rested on the lone testimony of Rogers directly refuted by three officers of the law in addition to the record testimony of Captain Eagan. Despite this top-heavy conflict, Judge SMITH chose to credit the accused, dismissing the officers with the statement that "it is quite natural for their recollection," some two and one-half years after the questioning, "to coincide with the version they must subconsciously prefer." (R. 433) This conclusion overlooks the fact that Captain Eagan had testified, within one month of the questioning, before the Grand Jury, and again at the trial shortly afterwards. (R. 230) This conclusion ignores the fundamental fact that Rogers' urge whether consciously or "subconsciously" to prefer his own version would be far more impelling than that of the officers. And this conclusion brands all four officers as being equally debased by their subconscious urges, so that not even one of them could testify truthfully.

> "We know that police standards often leave much to be desired, but we are not ready to believe that the democratic process brings to office men generally less believable than the average of those accused of crime." [3]

It should be noted that Judge SMITH made his finding without ever having seen or heard Captain Eagan — the principal witness during the evening session — from which the confession evolved. The finding was made by Judge SMITH while still laboring under the erroneous impression that Rogers was not warned of his right to remain silent (R. 177, 178), when in fact Rogers himself acknowledges such a warning from Eagan. (R. 28) An officer who offered such a warning and who also informed Rogers that he could not promise him any immunity or benefit (R. 385), should command something more than a sum-

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[3] Dissenting opinion of Mr. Justice JACKSON with Mr. Justice ROBERTS and Mr. Justice FRANKFURTER concurring, *Ashcraft* vs. *Tenn.*, 342 U. S. 143, 167 (1951).

mary dismissal of his "version" that Rogers did not ask for counsel.

Beside the direct testimony of the four officers that Rogers did not request counsel at any time on the day of his first confession, there is the further refutation of Rogers' claim implicit in his express election to dispense with counsel the following day when the coroner explicitly informed him of his right to counsel. (R. 347-348) As to this second confession, petitioner makes no claim that he requested counsel at any time that day. That he was aware of his rights, Rogers acknowledged in his testimony before Judge SMITH. (R. 39) Yet in the face of the coroner's warning he expressly declined to avail himself of these rights. (R. 348)

It should be noted also that, by reason of his prior arrests (R. 195) and as the brother of a police officer (R. 310), Rogers had extensive prior experience with police authorities. Paraphrasing the language in the *Stein* case, *supra*, it may be said that Rogers was not young, soft, ignorant or timid nor was he inexperienced in the ways of crime, its detection and investigation, nor was he dumb as to his rights. *Stein* vs. *New York*, *supra*, at 185-186. *Cf. Eiker* vs. *Alabama*, 352 U. S. 191 (1957); *Leyra* vs. *Denno*, 347 U. S. 556 (1954). He was well aware of his right to remain silent even before being reminded of it by Captain Eagan (R. 28), and he was quite competent to choose to dispense with counsel — as the trial court found he did on the occasion of both confessions. As stated by the Court of Appeals:

> "We see no valid reason for substituting the intuitive inferences of an able and conscientious federal judge on an issue of credibility for those of an able and conscientious state trial judge, where the evidence before each was essentially similar as Judge SMITH said it was." (R. 461)

Faced inescapably by the fact that four officers aver that Rogers made no request for counsel on the day of the first confession and that Rogers rejected the coroner's offer of counsel on the occasion of the second confession, petitioner refers to an episode on the day

following the first confession. At that time, without any request by Rogers for counsel, an office associate of Rogers' counsel endeavored to see him at the jail and was informed by the sheriff that he was being held incommunicado on the coroner's order. With the first confession being already a matter of record, and in the light of Rogers' election to proceed without counsel in his second confession, this occurrence cannot be held to be a constitutional violation.

In his attack on this particular finding, petitioner makes much of the fact that it was filed five months after trial. (Petitioner's Brief, p. 22) True, the formal finding was actually filed after trial in conformity with prescribed appellate procedure,[4] but obviously the *fact* was found by the court in the preliminary hearing directly after the conflicting testimony of Rogers and Eagan. The fact was found by the same judge to whom Judge SMITH pays tribute. It cannot seriously be contended that this finding "fully and conscientiously tried by an experienced judge" (R. 434), does not truly represent his conclusion from the evidence produced at the time of trial. The fact, as then found, was thereafter incorporated into the formal finding in the orderly progress of the appeal.

Nor is there any significance that in accordance with established state practice, the state's attorney submitted a proposed finding which the trial court thereafter adopted.[5] This the court was free to do, so long as the finding truly presented the facts as theretofore found by the court. Petitioner's insinuation that the conscientious and experienced trial judge would supinely accept a finding not in full accord with the fact is altogether unfounded.

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[4] *Conn. Prac. Book*, Sec. 389-391.

[5] Similar practice prevails in the federal courts. See *Rossiter* vs. *Vogel*, 148 F. 2d 292, 293 (2 Cir. 1945). *Schilling* vs. *Schweitzer-Cummins Company*, 142 F. 2d 82, 83 (D.C. 1944). *United States* vs. *Institute of Carpet Manufacturing of America*, 1 F.R.D. 636 (S.D.NY. 1941).

3. The Courts Below Were Justified in Concluding that Petitioner's Constitutional Rights Were not Violated By the Use of His Confessions at the Trial.

The test of voluntariness is "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime."

Lyons vs. *Oklahoma*, 322 U. S. 596, 602 (1943).

In applying this test of voluntariness and determining the admissibility of the confessions, the state trial court scrupulously applied the so-called "orthodox" rule,[6] long adhered to by the Connecticut courts. Under the orthodox method, the voluntariness of the confession is a question exclusively for the trial judge as a matter of the competency of the evidence and its truth or falsity is a matter exclusively for the jury. Legal writers generally recognize that the orthodox method provides the greatest protection to a defendant because it gives a clear cut adjudication of the constitutional issue which result is impossible under the New York system.

> "The particular procedure employed may, as was suggested earlier, have important consequences on the effectiveness of the defendant's protection against involuntary confessions. It seems likely that the protection is increased by the orthodox procedure under which the trial judge must resolve the conflicting evidence and determine whether a challenged confession is voluntary or not voluntary, before it is permitted to go to the jury."
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> Meltzer, *Involuntary Confessions*, 21 U.N. *Chic. L. Rev.* 317, 325.

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[6] There are two main constitutional methods of handling confessions at trial (1) the "orthodox" method, and (2) the "New York" method, and each state may determine the rule it wishes to follow. *Stein* vs. *New York*, 346 U. S. 156 (1953). *Lyons* vs. *Oklahoma*, *supra*, 3 *Wigmore on Evidence*, Sec. 861.

"A defendant in a criminal trial should at the trial stage be entitled to a cleancut adjudication as to whether he has been deprived of rights conferred by the federal constitution. The New York procedure clearly does not provide for such an adjudication." Meltzer, *Ibid.*, at 351. See also, *Cranor* vs. *Gonzales*, 226 F. 2d 83, at 89 (9 Cir., 1955); 3 *Wigmore on Evidence*, Sec. 861.

In pursuance of the orthodox method, the state trial court in the hearing on the admissibility of the confessions, accorded Rogers the right to have the jury excluded (R. 302); the right to testify and call witnesses in his behalf (R. 239-246); and the right to be immune from cross-examination on the merits. (R. 245-246) Thereafter the court ruled that the confessions were not the result of coercion and were competent for the jury's consideration. (R. 317) In so holding, the court determined only the voluntariness of the confessions without any reference to their truth or falsity. In further compliance with the orthodox method, the jury then considered the circumstances surrounding the making of the confessions in determining their weight and credibility under the court's charge, in part as follows:

"You will give these statements or confessions that you have before you whatever weight you consider they are entitled to, and in determining what weight you consider they are entitled to you consider all of the circumstances under which they were procured so far as these circumstances have been made known to you by the evidence. They include, among other things, the fact that the accused was in custody and under the control of the officers at the time; that he was kept in this status that has been described as incommunicado, and the other elements in the evidence before you; the manner in which he was taken from the jail to the State's Attorney's Office and to the coroner's office, and what transpired on each of those occasions; the facts relating to what was said to him about his desire for counsel and everything else that you recall as being disclosed to you by the evidence, as to the circumstances under which the confessions and statements

were made. All of the circumstances leading up to the making of these confessions, I say to you, are proper for you to consider in determining the weight that you are to give them. . . . It is for you to determine what weight you are to give to them, and in that connection, as I have said, you should consider the circumstances under which they were made. . . ." (R. 292-293)

This entire procedure was in full accord with the approved practice of handling confessions under the orthodox system,[7] and afforded Rogers all the advantage and protection inherent in that system.

The Supreme Court of Errors, on appeal, thereafter sustained the admissibility of Rogers' confessions, reiterating its long-standing rule:

"The test of the admissibility of a confession is whether it was voluntary." (R. 222)

The Connecticut appellate court thereby applied the rule of admissibility established by the federal judiciary consistent with the orthodox method. Thereafter in the course of discussing petitioner's claims, the Connecticut court went on to say:

"The question is whether under these and other circumstances the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated." (R. 222)

On the basis of this latter statement, the petitioner claims that the Supreme Court of Errors was applying the "truth-falsity" test of admissibility, notwithstanding the earlier categorical statement of the Connecticut court that voluntariness alone constitutes the test of its admissibility in this state. Analysis of the court's decision, in context with the two cases cited therein,[8] establishes be-

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[7] Meltzer, *Involuntary Confessions, supra* at 330.

[8] *State* vs. *Guastamacchio*, 137 Conn., 179 (1950); *State* vs. *Zukauskas*, 132 Conn. 450 (1945).

yond question that the Supreme Court of Errors was not deviating from its requirement of voluntariness, but was emphasizing the necessity of a causal connection between the circumstances complained of and the ensuing confession. Both of these cases cited by the state court concerned the indispensability of such a causal connection; both of them applied the Connecticut test of voluntariness; neither of them recognizes or refers in any way to the "truth-falsity" standard as a test of admissibility applicable in the State of Connecticut.[9] So it is clear that the Supreme Court of Errors was not thereby adopting the truth-falsity test.

In any event, this ambiguity by the appellate court, if such it be, is not at all relevant in these proceedings. See, *Strobel* vs. *California*, 343 U. S. 181, 197 (1942). The crucial criterion on this point is the action of the *trial court* and the test and procedure which that court followed in admitting the confessions into evidence. A glance at the state record is sufficient to assure that the test and procedure employed by the trial court met all the constitutional requirements of due process. The trial court concerned itself only with the issue of voluntariness. It specifically excluded any questions during the preliminary hearing concerning the truth or falsity of the confessions (R. 245-246), and it expressly delegated the truth-falsity issue to the jury's consideration alone:

> "You will recall that when the State offered these confessions in evidence you were excused while I considered the question of their admissibility. That I did hold these confessions were admissible you know. I want to caution you now, however, that this ruling on my part meant no more than that, in the performance of my duty, I concluded that

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[9] In *State* vs. *Guastamacchio*, *supra* at 183, the court states "it does not appear that the detention had any *casual connection* whatever with the giving or signing of the statement." (emphasis added); and in *State* vs. *Zukauskas*, *supra* at 459, the court states that, "The fact that an accused was illegally detained when the confession was made did not render it inadmissible unless that fact was *causally* connected with the securing of the confession." (emphasis added).

the circumstances surrounding the making of those statements were such that you should have them before you for your consideration and that my ruling is not to be taken by you as giving to those statements any more weight in your deliberations than you conclude they should have." (R. 292)

After this Court denied certiorari, 351 U. S. 952 (1956), petitioner sought this writ of habeas corpus. (R. 152). In its memorandum of decision ordering petitioner discharged from custody, the district court revealed its misconception of its role when called upon to examine the legality of a state prisoner's detention:

"On habeas corpus, the federal court *must* make its own determination of the underlying facts on the issues presented to it." (emphasis added) (R. 178)

In support of its ruling, the district court cited the *Cranor* case. But, as pointed out by the court of appeals, Judge SMITH and the petitioner misconstrued the holding of that case:

"The relator's reliance upon *Cranor* vs. *Gonzales, supra*, is misplaced . . . because there was no express finding as to the voluntariness of the confession in the state court, the federal court had no State finding to which it could have referred. The District Judge therefore, was faced with two choices. He might have attempted to acquire a trial transcript of the State trial and make his findings from the raw evidence therein contained; or, he might have held a hearing de novo. In the circumstances of the *Cranor* case justice might more surely have been achieved by the latter procedure which permitted observation of the witnesses. For credibility was crucial and had never been expressly determined before.

"The essential distinction between *Cranor* and the instant case is obvious. Connecticut follows the so-called 'orthodox' rule in testing the admissibility of confessions. *State* vs. *Guastamacchio*, 137 Conn. 179, 75 A. 2d. 429; *State vs. McCarthy*, 133 Conn. 171, 49 A. 2d. 594, 3 *Wigmore On Evidence*, Sec. 861. Here, the trial judge in conformity with that rule held a hearing before trial, made express findings, and concluded that the confessions were each voluntary.

> Whether we shall adopt the *Cranor* rule is a decision which can be deferred until we are presented with a case in which a state court has invoked the so-called 'New York' rule. It is sufficient for present purposes merely to observe that *Cranor* does not hold that a federal court on habeas corpus may try de novo an issue of fact which was expressly determined in the state trial." (R. 395-397)[10]

After remand, a majority of the Court of Appeals agreed with Judge SMITH that the circumstances surrounding the confessions were not such as to render them involuntary or inadmissible in evidence. In dissent, Judge CLARK asserts that a federal court may "make its own revaluation of the basic facts." (R. 480) But respondent has never disputed the power of the federal court to *revalue* historical facts in order independently to determine the constitutional issues. Our objection goes to the *remaking* of facts fairly found by the state court. The cases cited by Judge CLARK and petitioner in fact support our contention that in the absence of special circumstances, a federal court may not remake the historical facts:

> In *U. S. ex rel. Caminito* vs. *Murphy, supra,* (CLARK, C. J., sitting on the panel), the Court of Appeals expressly determined the constitutional issue on the undisputed facts and ignored all parts of relator's testimony which were disputed by police officers and made no attempt to retry the credibility of witnesses. Chief Judge CLARK, in his concurring opinion, stated that:
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> ". . . . I doubt the utility for dignified or effective law enforcement of review and overturn by a federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals" and ". . . *I can respect the views of the state judges*

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[10] It is interesting to note that the petitioner strongly urges this Court to accept Judge SMITH's initial conclusion that he must hold a hearing de novo but now on this appeal by implication rejects Judge SMITH's citation of the *Cranor* case as authority for that conclusion.

as rationally developed, even though I must disagree." 222 F. 2d at 706. (emphasis added)

In *U. S. ex rel. Sileo* vs. *Martin*, 2 Cir., 269 F. 2d 586, SMITH, J., writing for an unanimous Court, specifically employed the "unusual circumstances" or "vital flaw" test, before ordering the lower federal court to hold a hearing de novo. The "vital flaw" in this case arose from the lack of specific findings of historical facts.

In *U. S. ex rel Wade* vs. *Jackson*, *supra*, (CLARK, C. J., sitting on the panel), the Court expressly states at page 13 that "it is not our province" to pass on credibility of police witnesses but that the function of the federal court is "to make (its) own independent examination of the record to determine whether on the basis of the undisputed facts there is any merit to the claim," 256 F. 2d at page 9. (In the case at bar, Judge SMITH, on remand, after searching the state record and finding no reason not to accept the state trier's historical facts, made his independent determination of the constitutional issue upon those facts, precisely as sanctioned by JUDGE CLARK in the *Wade* case.)

In *Payne* vs. *Arkansas*, 356 U. S. 560 at page 562, this Court again stressed that a state court's findings of fact if fairly made upon substantial and conflicting testimony, as to the circumstances surrounding the contested confession "are not this Court's concern." (In the present case, Judge SMITH specifically found that the state trier's findings of historical facts were fairly and conscientiously made by an experienced judge.) (R. 434)

To the same effect see *Fikes* vs. *Alabama*, 352 U. S. 191; *U. S. ex rel. Corbo* vs. *LaVallee*, 2 Cir., 270 F. 2d 513; *Leyra* vs. *Denno*, *supra*; *U. S. ex rel. Savini* vs. *Jackson*, 250 F. 2d 349, 351; *U. S. ex rel Alvarez* vs. *Murphy*, 2 Cir. 246 F. 2d 871, 265 F. 2d 497.

Analysis of petitioner's five principal points reveals that Rogers' constitutional rights were not violated and that Judge SMITH's decision on remand sustaining the holding of the whole hierarchy of the Connecticut state judiciary was not erroneous.

(A) There Was No Lack of Warning

It is not true in fact that Rogers was not informed of his rights. Both Rogers and Eagan are in agreement that adequate cautions were given. Petitioner ignores this decisive testimony of Rogers himself.

> "Q. What took place after he (Eagan) got there? A. He sat down and started talking about the time I was in the County Jail on parole from Elmira that he remembered me from then, and then said . . . in other words, *I didn't have to say nothing to him.*" (R. 28) (emphasis added)

Certainly no more authoritative witness than Rogers himself could be produced to prove that, before confessing, he was aware of his right to remain silent. Here he presents proof positive that he was unequivocally told and that he thoroughly understood his right "to say nothing."

In an effort to show that Eagan did not warn Rogers (1) that "anything he said would be used against him" and (2) that "he didn't have to say anything," petitioner quotes merely a limited portion of Eagan's testimony. (Petitioner's Brief 46) Petitioner avoids the testimony given by Eagan when he was finally free to phrase his responses "the way you think you ought to answer it." (R. 201) His testimony establishes that he told Rogers "what he told me would not be of any benefit to him . . . because I had no power to draft any charge" (R. 201), and again, "nothing he talked to me about, *if he did talk*, could be of benefit to him, it would be up to the court or jury. . . ." (R. 385) (emphasis added) These warnings might not have been couched in the formal terms which petitioner's counsel tried to insist upon, but they were in language which petitioner could and, admittedly, did understand.

Although "lack of warning" loomed large in Judge SMITH's original decision, it is obvious that he, too, had overlooked this vital testimony of Rogers, in whose credibility on the issue of re-

quest for counsel he had placed such faith. Confronted on remand with this explicit acknowledgment by Rogers, Judge SMITH makes not even a mere mention of "lack of warning" in his ensuing decision.

From these explicit statements by Captain Eagan and from Rogers' own acknowledgment, there is no dodging the conclusion that Rogers was fully aware of his right to keep silent and that what he said would be used against him. In point of fact however, Rogers did not need to be informed or instructed on these matters. His information on this subject long antedated this questioning. His vast experience with the police (R. 195, 319) admirably equipped him with adequate knowledge of his constitutional rights. The warnings given by Captain Eagan served effectively to reinforce his prior knowledge on the subject.

Nor can there be any question as to the second confession. The record contains the full statement of the coroner as to Rogers' right to remain silent as well as his right to counsel, followed by Rogers' acknowledgment of his understanding of these rights. (R. 347-348)

(B) The Statement of Intention to Request Rogers' Wife Does Not Constitute a Threat

During the course of the interrogation Captain Eagan informed Rogers that he was intending to send for Rogers' wife in order to question her as to any knowledge she might have of the affair. (R. 234, 385) This statement petitioner contends to be a threat which overcame Rogers' powers of resistance and resulted in an involuntary confession. We respectfully submit that such a statement does not constitute a threat, and certainly, as even Judge SMITH concedes, it was hardly likely to cause a confession to a capital crime. (R. 179)

The police here were engaged in the investigation of a brutal murder. Rogers, by reason of his possession of the murder

weapon was a reasonably natural suspect. No investigation worthy of the name would fail to give high priority to the questioning of Rogers' wife. Rogers concedes that Captain Eagan asked him whether he had any conversations with his wife regarding the crime. (R. 243) As stated by the court of appeals "she was a legitimate subject of police inquiry". (R. 464) Since questioning her would not have been illegal, a mere statement of an intention to do so should not be considered illegal. And most certainly it should not be classified as a threat that would vitiate a confession. A statement to do something that an officer has a right to do is not a "threat" in the legal sense.[11]

Statements almost identical to those used by Captain Eagan have been upheld in both federal and state courts:

In *Vogt* vs. *U. S.* 5 Cir, 156 F. 2d 308 (1946), police officers stated: "We are going to pick up your wife and bring her down to jail and question her, too." In sustaining the admissibility of the confession the court held at page 312: "Such a remark by the investigating officers cannot be classified as such a threat as would destroy the voluntariness of the defendant's confession. Even if one of the defendants made the confession in order to prevent his wife from being investigated, it was, nevertheless, his voluntary statement."

In *Hawkins* vs. *U. S.*, D.C., 158 F. 2d 652 (1946), the court stated that such threats would not render the confession involuntary, because "it is not obviously probable that a man who confesses to a capital crime does so in order to expedite the release of relatives who are not implicated or accused, even if he had been told that this result will follow."

In *People* vs. *Hubbell*, 128 P. 2d 579 (1942), the court held that the defendant's motive to prevent children from being brought into court did not render the confession involuntary, stating at page 594, that: "It must be apparent that a

[11] *United States* vs. *Danlong*, 60 F. Supp. 235, 236 (1945).

confession dictated by the hopes and motives of the accused and inspired solely by his own mental processes and emotions is voluntary in the legal sense."

See also *Ruhl* vs. *U. S.*, 10 Cir. 148 F. 2d 173 (1945); *Henson* vs. *State*, 159 Tex. Cr. 647, 266 S.W. 2d 864 (1954); *State* vs. *Griego*, 294 P. 2d (1956); *State* vs. *Beard*, 16 N. J. 50, 106 A. 2d 265 (1954); *State* vs. *Pierce*, 72 A. 2d 311 (1950); *People* vs. *Curely*, 114 Cal. App. 2d 577, 250 P. 2d 667 (1952); *McCutcheon* vs. *State*, 159 Tex. Cr. 61, 261 S. W. 2d 329 (1953); and *People* vs. *Candiotto*, 275 P. 2d 500 (1954).

Even assuming that the statement might be construed as a threat, it was not the motivation for either of the confessions. Rogers' acknowledgment that he would not have confessed had he known that his wife could not be used as a witness against him (R. 38), shows that he was concerned as to what incriminating information she might disclose, and completely refutes the claim that he confessed to save her from police interrogation. It conclusively establishes that the "threat" was not the motivating cause of the confession.

Petitioner seems to concede that Mrs. Rogers would be a legitimate subject of inquiry but claims that she was rendered immune because she was "ailing" and "arthritic." (Petitioner's Brief 47-48) Judge CLARK in his dissenting opinion goes even further and refers to "his crippled wife," (R. 474) although there is not the slightest evidence to support either claim beyond the bare assertion of Rogers himself. If she was in fact sick, Rogers would have said so to Eagan. Instead, he acknowledges that the only objection interposed by him was: "She don't know anything." (R. 28) Significantly, Eagan recalls it as "She wouldn't know anything about anything I do." (R. 265) At no point does Rogers claim that he told Eagan his wife was sick and Eagan specifically testified that he knew of no such sickness (R. 199), and Detective Holtz, too, testified he "never heard of that." (R. 67) Add to this the undeniable fact that Mrs. Rogers exhibited no difficulty

in daily attendance at the protracted trial without assistance (R. 67), and it becomes obvious that her "sickness" was not a factor in the confession.

Far more reasonable is the inference that Rogers' motive in confessing was his own self-interest and not the result of solicitude for his wife. During the hour which he used to consider whether to confess (R. 243), he had ample time to ponder the substantial nature of the proof against him: his possession of the murder gun on the day of the murder (R. 285-286); his false report to the police directly after the murder that the gun had been stolen by persons unknown (R. 286); his possession of the murder gun on the night of his arrest; his contradictory statements at the time of that arrest, first claiming that he won the gun, and afterwards admitting that he had stolen it from his nephew's home on the day of the murder. (R. 285-286)

Reflecting on these formidable facts, he considered some means of mitigating his plight by putting the best possible face on the crime which he could not longer deny. Accordingly he hit upon the time-worn expedients of blaming liquor and the victim who could not longer refute him. He first claims that he was drinking (R. 200) and then concocts an adulterous relationship with the decedent culminating in abusive remarks as provocation for the shooting. (R. 325-346) By these excuses, he hoped to gain some measure of exoneration. This was his motivation in confessing. The "threat" was actually inconsequential.

Rogers' claim that the effect of this "threat" persisted so as to motivate his confession the next day is even more untenable. (R. 38) When Rogers was presented before the coroner, some twenty hours had elapsed since the "threat" was made. Instead of being transported by police officers, the high sheriff, who had legal custody of Rogers, produced him before the coroner. (R. 16) Captain Eagan was not among those present. The tribunal was one specifically authorized by law. The coroner advised Rogers of his rights at length (R. 40) and Rogers concedes that he

understood what his rights were. (R. 39) These differences in circumstance, in time, and place, and cast of characters impel the conclusion that the effect of this "threat" had been completely dissipated prior to his second confession. This conclusion is all the more indicated by reason of the anemic character of Captain Eagan's statement. It should be noted, too, that the "threat" allegedly was to be put into operation only if Rogers did not confess. With Rogers' first confession already a matter of stenographic record, the threat lost all substance and relevance.

Lyons vs. *Oklahoma, supra* at 602.

(C) The Removal from Jail Was Not a Constitutional Violation

It should be noted that on the date of the confession, petitioner was being held in the county jail on lawful process relating to other charges. On receipt of the ballistics report, petitioner naturally became an immediate subject for interrogation. Concededly, he might have been questioned at the jail. Instead, by written request of the state's attorney's office addressed to the jailer, he was brought to that office for questioning. (R. 266) Concededly, his presence there could have been brought about by court order. However, since the lack of such order was completely unknown to Rogers, his confession cannot be claimed to be causally connected with the method used.[12]

Petitioner claims that his removal was illegal, citing Section 54-15 of the Connecticut General Statutes. Even if this were so, Connecticut law holds that a confession if otherwise admissible cannot be rejected for that reason.[13] In any event this statute does not prohibit a suspect from being temporarily removed from jail for interrogation concerning another crime. It relates merely

[12] *Sykes* vs. *United States* (D.C.), 143 F. 2d 140 (1944). *State* vs. *Guastamacchio*, 137 Conn. 199, 183 (1950).

[13] *State* vs. *Zukauskas*, 132 Conn. 450, 458. *State* vs. *Buteau*, 136 Conn. 113, 123. *State* vs. *Guastamacchio, supra.*

to his ultimate discharge from jail. Even under the *McNabb* doctrine in federal jurisdictions police, without court order, may lawfully examine a prisoner arrested and held on other charges. *Palakiko* vs. *Harper*, Warden, *supra*; *U. S.* vs. *Carignan*, 342 U. S. 36, 45 (1951).

In these cases this Court pointed out that constitutional requirements do not forbid such private examination of persons in lawful custody. Assuming *arguendo* that Rogers' removal without court order was illegal, it was at most a technical irregularity and does not constitute a constitutional violation. *Palakiko vs. Harper, supra* at 94; *Rogers* vs. *Richmond, supra*, (R. 463); *U. S.* vs. *Carignan, supra* at 39. As Judge SMITH acknowledged in his original decision, this ground was not sufficient in itself to vitiate petitioner's confessions and did not constitute a denial of due process. (R. 179) See also *Stein* vs. *New York, supra*; *State* vs. *Buteau, supra*; *State* vs. *Guastamacchio, supra*.

(D) There Was no Prolonged Questioning

The state trial judge found that Rogers was not subjected to continuous or extended questioning. (R. 316) The district court acknowledged that the questioning was intermittent. (R. 176) Concededly, there was here none of the "pressure of unrelenting interrogation," which was condemned in *Watts* vs. *Indiana*, 338 U. S. 49, 54 (1949).

The questioning period falls far short of limits heretofore found unobjectionable by this Court:

Lisenba vs. *California*,[14] where the defendant got no sleep in the first forty-two hours of questioning.

Gallegos vs. *Nebraska*,[15] prolonged questioning on five days.

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[14] 314 U. S. 219 (1941).

[15] 342 U. S. 55 (1951).

Stein vs. *New York*,[16] twelve hours of intermittent questioning.

Lyons vs. *Oklahoma*,[17] questioning from 6:30 P. M. to between 2 and 4 A. M.

Here the questioning started at 2:00 P. M. (R. 195) and Rogers confessed shortly after 10 P. M. (R. 195) From this elapsed time, there should be subtracted the one full hour during which Rogers considered whether to confess (R. 243), and what to claim in mitigation; and there should also be deducted the several intermissions heretofore referred to for the serving of food and coffee, smoking, going to the men's room, telephone calls and checking by the police. (R. 34-37, 316) Compare this time with the cases cited above where the confessions were found voluntary. Contrast this time with cases where this Court has ruled the confessions involuntary:

Watts vs. *Indiana*,[18] five-night sessions with loss of sleep.

Turner vs. *Penn.*,[19] questioning for four consecutive days.

Malinski vs. *New York*,[20] questioning on five days.

Harris vs. *South Carolina*,[21] questioning for twelve hours and two other sessions.

As stated in *Stein* vs. *New York*, *supra* at 184:

> "Interrogation is not inherently coercive as is physical violence . . . this Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive. . . . Of course the process of interrogation can be so prolonged and unremitting, especially when accompanied by deprivation of refreshment, rest or relief as to accomplish extortion of an involuntary confession."

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[16] 346 U. S. 156 (1953).
[17] 322 U. S. 596 (1944).
[18] 338 U. S. 49 (1949).
[19] 338 U. S. 62 (1949).
[20] 324 U. S. 401 (1945).
[21] 338 U. S. 68 (1949).

Rogers' own testimony establishes that there was no such deprivation, and the district court has found that the questioning was not unremitting. (R. 176) Hence it can be said that the questioning here was not of such length or character as to be coercive.

> "Questioning is an indispensable instrumentality of justice . . . we cannot read an indiscriminate hostility to mere interrogation into the Constitution without unduly fettering the states in protecting society from the criminal."
>
> *Ashcraft* vs. *Tenn.*, 322 U. S. 143, 160 (1951).

(E) Assuming, Arguendo, That Petitioner Did Request Counsel, There Was No Violation of His Constitutional Rights

We have heretofore pointed out (1) that the courts below were amply justified in accepting the state court's finding that petitioner did not request counsel at any time prior to his confessions and (2) that any finding to the contrary must necessarily be based on the premise that four officers sworn to uphold the law are perjurers while a confessed murderer is altogether trustworthy as a witness in his own trial. (Point 2, *supra*) We further maintain that even assuming, *arguendo*, that petitioner did request counsel, there was no violation of his constitutional rights.

Petitioner was not under arrest or under indictment for the Kennedy murder when he was questioned by the police. His status as a suspect brings him clearly within the rules set forth by this Court in the *Crooker* [22] and *Cicenia* [23] cases. As stated in *Crooker* vs. *California*, *supra* at 437:

> "The bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained."

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[22] 357 U. S. 433 (1958).
[23] 357 U. S. 504 (1958).

Both these cases expressly permit police interrogation of a suspect, without the presence of counsel, prior to a formal accusation of crime. Petitioner seeks to distinguish them on the grounds that Rogers had "formal criminal charges" lodged against him while the defendants in these other cases did not. Even if this were sufficient ground for distinction it cannot serve here, where the interrogation had no relation to the formal charges pending against Rogers.

Petitioner seems to urge a rule barring use of a voluntary confession in a capital case if it was procured during interrogation of the defendant *as a suspect* unless he was specifically given an opportunity to secure counsel. Petitioner claims that such a confession is void *ab inito* even if there is "no specific showing of prejudice." (Petitioner's Brief, p. 53) But, "Even in federal prosecutions this Court has refrained from laying down any such inflexible rule." *Ciccnia* vs. *Lagay*, *supra* at 509. And this Court, in *Crooker*, at pp. 439-440, emphasized that prejudice must be shown before this Court will set aside a state court conviction. The test is "Whether petitioner's denial of counsel at pretrial stages so prejudiced him that it infected his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'"

Since the record is barren of any evidence that counsel could have advised Rogers of any right that he was unaware of or not advised of by Captain Lagan, petitioner is relegated to the necessity of claiming that prejudice need not be proven by him. If the function of counsel is to advise his client of his right to keep silent and that anything he says can be used against him, certainly, in the case of Rogers, the absence of counsel was not prejudicial. For, as heretofore pointed out, Rogers was amply warned of his rights and he fully understood them. (Point 3A, *supra*)

That this Court draws a distinction between state prosecutions and federal proceedings is further evidenced by its citation of this case, *State* vs. *Rogers*, as authority for the proposition that cer-

tain states have a rule that an accused has no right to consult with counsel during the period of police interrogation and prior to arraignment, which rule this Court recognizes as well within the constitutional province of the police powers of each state. 357 U. S. at 519. *Cf. McNabb* vs. *U. S.*, 318 U. S. 332 (1943); *Glasser* vs. *U. S.*, 315 U. S. 60 (1942) Deviation from this settled rule would require this Court "to apply the Fourteenth Amendment in a manner which would be foreign both to the spirit in which it was conceived and the way in which it was implemented by this Court. The Fourteenth Amendment does not reach so far." 357 U. S. at 510.

(F) Neither Singly Nor in Combination Would These Circumstances Violate Due Process

Without by any means conceding that these factors were present in this case, a review of the leading cases clearly reveals that even where denial of counsel, illegal removal from jail, lack of warning, threat, and prolonged questioning, have been established by clear and convincing proof, they would not either singly or in combination be sufficient to render the conviction invalid. See *Lisenba* vs. *California, supra; Gallegos* vs. *Nebraska, supra; Palakiko* vs. *Harper, supra; Stroble* vs. *California, supra; Stein* vs. *New York, supra.*

As heretofore stressed, the test of voluntariness turns upon "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or deny a suspected participation in a crime." *Lyons* vs. *Oklahoma, supra* at 602.

Applying this test to Rogers, we see that in the free exercise of his "mental freedom to confess or deny," Rogers made the calculated choice to confess and to invent an elaborate story in excuse and justification in order to serve his own self-interest. His confession was not an abject capitulation. He carefully considered what he should say. The confession itself constitutes a dramatic

refutation of the claim that Rogers lacked mental freedom. It demonstrates his self-possession and coolness throughout. Wtihout full mental freedom he would have been unable to improvise the relationship between the deceased and himself which he claims in provocation of the murder. His recital was not merely a supine attempt to give desired responses to leading questions but was the considered product of his mental processes. Cf. *Leyra* vs. *Denno, supra; Lyons* vs. *Oklahoma, supra* at 605. A full consideration of all of these circumstances "reduced to absurdity his present claim that he was coerced into confession." *Stein* vs. *New York, supra* at 186.

CONCLUSION

The respondent respectfully prays that this Court allow the decision of the Court of Appeals to stand.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1960.

Harold D. Rogers, Petitioner, v. Mark S. Richmond, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 20, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case has a long history. It must be told with some particularity in order to unravel issues ensnarled in protracted litigation in both state and federal courts, turning essentially on the admissibility of confessions.

The Trial.—Petitioner was found guilty of murder by a jury in the Superior Court, New Haven County, Connecticut. The undisputed evidence leading to the conviction may be briefly told. On January 9, 1954, New Haven, Connecticut, police arrested petitioner on charges of committing attempted robbery and other crimes on that day at a local hotel. At the time of his arrest petitioner had in his possession a revolver. Subsequent ballistics tests tended to show that this weapon, which had been reported stolen from the home of petitioner's nephew, was used in a fatal shooting during a liquor store robbery in West Haven, Connecticut, on November 21, 1953, the same day its disappearance was discovered.

Petitioner was lodged in the New Haven County Jail pending trial on the charges that prompted his arrest. On January 30, 1954, he was transported without court order from the jail to the office of the State's Attorney for questioning in connection with the West Haven killing. The interrogation commenced at approximately 2 p. m.

of that day and continued throughout the afternoon and evening. During the interrogation petitioner was allowed to smoke, was brought a sandwich and coffee, and was at no time subjected to violence or threat of violence.

After petitioner had been intermittently questioned without success by a team of at least three police officers from 2 p. m. to 8 p. m., New Haven Assistant Chief of Police Eagan was called in to conduct the investigation. When petitioner persisted in his denial that he had done the shooting, Chief Eagan pretended, in petitioner's hearing, to place a telephone call to police officers, directing them to stand in readiness to bring in petitioner's wife for questioning. After the passage of approximately one hour, during which petitioner remained silent, Chief Eagan indicated that he was about to have petitioner's wife taken into custody. At this point petitioner announced his willingness to confess and did confess in a statement which was taken down in shorthand by an official court reporter.

The following morning the Coroner of New Haven County issued an order that petitioner be held incommunicado at the jail. When a lawyer associated with counsel whom petitioner had previously retained to defend him on the attempted robbery charge called at the jail to see petitioner, he was turned away on the authority of the Coroner's order. Petitioner was then transported to the County Court House for interrogation by the Coroner, who had been informed of his confession of the previous night. There he was put on oath to tell the truth but warned that he might refuse to say anything further and advised that he might obtain the assistance of counsel. Petitioner again confessed to the shooting in a statement recorded by the same official court reporter.

Petitioner's defense at the trial was directed toward discrediting the confessions as the product of coercion. In accordance with Connecticut practice, see, *e. g.*, *State*

v. *Willis*, 71 Conn. 293, 41 A. 820; *State* v. *Guastamachio*, 137 Conn. 179, 75 A. 2d 429, the trial judge heard the evidence bearing on admissibility of the confessions without the jury present. At this hearing petitioner testified that shortly after the commencement of the interrogation he asked to see a lawyer but was never permitted to do so. He also testified, with reference to Chief Eagan's pretense of bringing petitioner's wife in for questioning, that this move took the form of a threat to do so unless he confessed and that in making this threat Chief Eagan told him that he would be "less than a man" if he failed to confess and thereby caused her to be taken into custody. According to petitioner his wife suffered from arthritis, and he confessed to spare her being transported to the scene of the interrogation.

The State met petitioner's account with the testimony of Chief Eagan. He testified that petitioner made no request to see a lawyer during his presence in the room. However, it will be recalled that Chief Eagan did not arrive until the questioning had run a course of six hours and that petitioner claimed to have requested counsel during that period. Chief Eagan also denied that he had framed his remarks about bringing petitioner's wife in for questioning as a threat or that he had suggested that petitioner would be "less than a man," etc.

On the basis of the evidence summarized, the trial judge concluded that the confessions were voluntary and allowed them to go to the jury for consideration of the weight to be given them under all the circumstances that led to them. Conviction of petitioner for murder followed.

Review by the Connecticut Supreme Court.—On appeal, the Supreme Court of Errors of Connecticut, finding no error in the trial judge's admission of the confessions, affirmed the conviction. *State* v. *Rogers*, 143 Conn. 167, 120 A. 2d 409.

First Federal Habeas Corpus Proceeding.—In August of 1956, after satisfying the rule of *Darr* v. *Burford*, 339 U. S. 200, petitioner sought a federal writ of habeas corpus, basically on the ground that since the confessions were secured under circumstances rendering them constitutionally inadmissible, he was denied due process of law under the Fourteenth Amendment. The United States District Court for the District of Connecticut held a hearing based on the evidence offered by the parties. This evidence included excerpts from the record of the state proceedings as well as testimony of petitioner and various state officials. Neither petitioner nor respondent submitted the entire transcript of the state proceedings and the district judge did not call for it. Petitioner again testified that before he confessed he had requested an opportunity to confer with his lawyer. His testimony was flatly contradicted by three police officers called by the State's Attorney, none of whom had testified at the trial.

On the testimony before him, the district judge made findings which differed from those of the state trial judge in several important respects. He accepted petitioner's testimony that during the police interrogation he had asked to see his lawyer before he yielded to Chief Eagan's efforts to have him confess. He also found that the confession before the Coroner was the product of fear that repudiation of the earlier confession would lead the police to take his wife and foster children into custody. Accordingly, he concluded that "The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part." *United States ex rel. Rogers* v. *Cummings*, 154 F. Supp. 663, 665. He therefore set aside the judgment of conviction.

First Court of Appeals Review.—On appeal, the United States Court of Appeals for the Second Circuit vacated the District Court's judgment, finding that it was error to

hold a hearing *de novo* on issues of basic evidentiary fact that had been considered and adjudicated by the state courts. Relying on *Brown* v. *Allen*, 344 U. S. 443, the Court of Appeals concluded that the district judge should have called for the entire state record before reaching his decision. It held

> "that in the case now before us the nature of the issues presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the State proceedings. . . . Only on an adequate state record can the District Court determine if a vital flaw exists which warrants correction by extrinsic evidence." *United States ex rel. Rogers* v. *Richmond*, 252 F. 2d 807, 810, 811.

The Court of Appeals remanded the case to the District Court with the following instructions:

> "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court." 252 F. 2d, at 811.

Certiorari Proceeding.—The petitioner sought certiorari here and we denied the petition with this *per curiam* opinion:

> "The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen*, 344 U. S. 443, 506, *et seq.*" *Rogers* v. *Richmond*, 357 U. S. 220.

Second Federal Habeas Corpus Proceeding.—On remand, the district judge had before him the entire transcript of the state proceedings and on the basis of it dismissed the petition. *United States ex rel. Rogers* v. *Richmond*, 178 F. Supp. 69. While he adhered to his belief in petitioner's testimony in the first habeas corpus hearing, he now considered himself obliged to accept the state court's "Findings," rather than his own, on all points of historical fact "unless some vital flaw or unusual circumstance exists or some other basis appears for consideration of testimony outside the record." 178 F. Supp., at 71–72. The district judge found no such "flaw" or "circumstance" to permit retrial of the issue of the voluntariness of the confessions. He thus stated his position:

> "The issue of whether request for counsel was made and the issue of voluntary character of the confessions were fully and conscientiously tried by an experienced judge. Subsequent disagreement with his weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here." 178 F. Supp., at 73.

On this basis the district judge could not find that the confessions were the product of coercion.

Second Court of Appeals Review.—The Court of Appeals for the Second Circuit affirmed this judgment, one judge dissenting. *United States ex rel. Rogers* v. *Richmond*, 271 F. 2d 364. The court held that the district judge was correct in restricting himself to the state court's "Findings" regarding petitioner's request to see his lawyer before confessing, and agreed with him that the facts in the record did not justify the conclusion that petitioner's confessions were not voluntary.

Because issues concerning the appropriate procedure for dealing with petitions for federal habeas corpus in relation

to state convictions were urged, we brought the case here. 361 U. S. 959.

A critical analysis of the Connecticut proceedings leads to disposition of the case on a more immediate issue. For it compels the conclusion that the trial judge in admitting the confessions as "voluntary," and the Supreme Court of Errors in affirming the conviction into which the confessions entered, failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession.

Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i. e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. *See Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219, 236; *Rochin* v. *California*, 342 U. S. 165, 172–174; *Spano* v. *New York*, 360 U. S. 315, 320–321; *Blackburn* v. *Alabama*, 361 U. S. 199, 206–207. And see *Watts* v. *Indiana*, 338 U. S. 49, 54–55. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such

verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

In the present case, while the trial judge ruled that each of petitioner's confessions was "freely and voluntarily made and accordingly was admissible in evidence," he reached that conclusion on the basis of considerations that undermine its validity. He found that the pretense of bringing petitioner's wife in for questioning "had no tendency to produce a confession that was not in accord with the truth." Again, in his charge to the jury, he thus enunciated the reasoning which had guided him in admitting the confessions for its consideration:

> "No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible. . . . The rules which surround the use of a confession are designed and put into

operation because of the desire expressed in the law that the confession, if used, be probably a true confession."

The same view—that the probable reliability of a confession is a circumstance of weight in determining its voluntariness—entered the opinion of the Supreme Court of Errors of Connecticut in sustaining the trial judge's admission of the confession:

> "If we concede that this [petitioner's claims of illegal removal from jail and incommunicado detention] was all true and that such conduct was unlawful, it does not, standing alone, render the defendant's confessions inadmissible. The question is whether, under these and other circumstances of the case, that conduct induced the defendant to confess falsely that he had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions." 143 Conn., at 173; 120 A. 2d, at 412.

And again:

> "Proper court authorization should have been secured before the defendant was removed from the jail. There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an untrue statement. The same can be said concerning the refusal to admit counsel to see the defendant on the morning of January 31 before he was brought before the coroner." 143 Conn., at 173–174; 120 A. 2d, at 412.

Concerning the feigned phone call that petitioner's wife be brought in to headquarters, the Supreme Court concluded:

> "Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement." 143 Conn., at 174; 120 A. 2d, at 412.

From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity.[1] And this is not a

[1] We find support for this conclusion in a line of Connecticut cases, some of which are cited by the Supreme Court of Errors in *Rogers*. See *State* v. *Willis*, 71 Conn. 293, 307–312, 41 A. 820, 824–826; *State* v. *Cross*, 72 Conn. 722, 727, 46 A. 148, 150; *State* v. *DiBattista*, 110 Conn. 549, 563, 148 A. 664, 669; *State* v. *Palko*, 121 Conn. 669, 680, 186 A. 657, 662; *State* v. *Tomassi*, 137 Conn. 113, 127–128, 75 A. 2d 67, 74; *State* v. *Guastamachio*, 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain*, 141 Conn. 694, 700, 109 A. 2d 504, 507. But see *State* v. *Wakefield*, 88 Conn. 164, 90 A. 230; *State* v. *Castelli*, 92 Conn. 58, 101 A. 476; *State* v. *Zukauskas*, 132 Conn. 450, 45 A. 2d 289; *State* v. *Buteau*, 136 Conn. 113, 68 A. 2d 681; *State* v. *Malm*, 142 Conn. 113, 111 A. 2d 685, containing no reference to a "truth-falsity" test. Connecticut case law regarding the admissibility of confessions allegedly secured under circumstances which render them involuntary, or by means of promises, "artifices," "deception" or illegal police practices not amounting to coercion, is not free from uncertainty. We need not now endeavor to ascertain the extent to which, or the circumstances under which, Connecticut courts generally look to reliability as the criterion, alone or in conjunction with other criteria, of admissibility. If petitioner in the present case has been convicted through the use of a constitutionally impermissible standard, it is indifferent that Connecticut law, in its operation in other cases, may be unimpeachable. What that law does reveal of relevance here is that conceptions of probable truth or probable falsity have had and appear still to have a place in the reasoning of Connecticut judges in classes of cases having similarities to *Rogers* and relied on therein. Without meaning to consider the validity of such reasoning, under the Fourteenth Amendment, in any applications but the one now before us, we do derive from its currency in a continuing line of Connecticut decisions confirmation of our conclusion that the language of the trial judge and of the Supreme Court of Errors in the *Rogers* case is not the product of mere verbal inadvertence or unreflective phraseology, but an accurate embodiment of the mode of reasoning which led to holding that petitioner's confessions were admissible as "voluntary."

permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge and the Supreme Court of Errors, of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction, pursuant to which Rogers is now detained "in violation of the Constitution."[2] A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession, such as is involved in this case, may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried, and the conviction was vitiated by error of constitutional dimension.[3]

It is not for this Court, any more than for a Federal District Court, in habeas corpus proceedings, to make an independent appraisal of the legal significance of facts

[2] 28 U. S. C. § 2241 (c)(3).

[3] Determination of the admissibility of confessions is, of course, a matter of local procedure. But whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment. If the question of admissibility is left to the jury, they must not be misdirected by wrong constitutional standards; if the question is decided by the trial judge, he must not misdirect himself.

gleaned from the record after such a conviction. We are barred from speculating—it would be an irrational process—about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known.

As a matter of abstract logic it is arguable that Rogers may not have been deprived of a constitutional right, nor held in custody in violation of the Constitution, within 28 U. S. C. § 2241 (c)(3), solely because the Connecticut trial court applied an impermissible constitutional standard in admitting his confession—that Rogers was not so deprived, or so held, unless "in fact" his confession was coerced, a "fact" to be ascertained from the state record on direct review here, or *de novo* by a federal district judge in habeas corpus proceedings. Such a view ignores both the volatile and amorphous character of "fact" as fact is found by courts, and the distributive functions of the dual judicial system in our federalism for the finding of fact and the application of law to fact. In coerced confession cases coming directly to this Court from the highest court of a State in which review may be had, we look for "fact" to the undisputed, the uncontested evidence of record. See *Watts* v. *Indiana*, 338 U. S. 49, 50–52. This is all that we may look to, in the absence of detailed state-court findings of historical fact, because this Court cannot sit as a trial tribunal to hear and assess the credibility of witnesses. Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration. And in any event, there must be a foundation in fact for the legal result. See

Thompson v. *Louisville*, 362 U. S. 199. With due regard to these considerations, it would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in which the trial judge or trial jury—whichever is charged by state law with the duty of finding fact pertinent to a claim of coercion—passes upon that claim under an erroneous standard of constitutional law.[4] In such a case, to look to the wholly undisputed evidence, in the event conflicting evidence is presented, would deprive the state criminal defendant of the benefit of whatever credit his testimony might have been given by the state judge or the state jury, had the judge or jury employed a proper legal standard. Nor, in a case where specific findings are made concerning the allegedly coercive circumstances, can those findings be fairly looked to for the "facts," since findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for. Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct con-

[4] A different question was implicitly presented in *Stroble* v. *California*, 343 U. S. 181. In that case the trial judge permitted the confessions to go to the jury under instructions which told it to disregard them if it found that they were not voluntarily made, and which adequately defined the "voluntariness" required by due process. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 601. Thus, there was no flaw in the verdict as rendered. An erroneous legal standard for determining the admissibility of allegedly coerced confessions was interjected into the proceeding only at the level of the Supreme Court of California. Had the State Supreme Court, under similar circumstances reversed the conviction, not on the basis of local law but solely by reason of a misinterpretation of this Court's principles governing coerced confessions, and had the case been brought here for review on certiorari, the jury's verdict would have had to be reinstated. In any event, the question presented in *Stroble* was not faced squarely, and in illuminating isolation, in that case. Compare *Lee* v. *Mississippi*, 332 U. S. 742, with *Stroble*.

clusions if and merely because a correct standard is later applied to them.

Of course, where the issue of coercion is raised not on direct review in this Court but by petition for habeas corpus in a Federal District Court, one alternative method of proceeding impossible on direct review is available. The District Court might conceivably hold a hearing *de novo* on the issue of coercion. But such a procedure would neither adequately protect the federal rights of state criminal defendants nor duly take account of the large leeway which must be left to the States in their administration of their own criminal justice. A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. Where he has not had that opportunity he should not be required to establish in a Federal District Court, before a federal district judge who must consider the issue of the voluntariness of the confession in a certain abstraction from the whole, living complex of a criminal trial, and perhaps many years after the occurrence of the events surrounding the confession, facts establishing coercion. On the other hand, the State, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial—to ask him to approximate the sympathies of the defendant's peers or to make the rulings which the state trial judge might make, within the exercise of his discretion concerning the admission of evidence at the borderline of constitutional permissibility—is potentially to prejudice state defendants claiming federal

rights and to pre-empt functions that belong to state machinery in the administration of state criminal law.

In view, therefore, of the constitutionally inadequate test applied by the Connecticut courts for determining whether the confessions were voluntarily given, we need not, on this record, consider whether the circumstances of the interrogation and the manner in which it was pressed barred admissibility of the confessions as a matter of federal law.[5] In the case before us, the state trial court misconstrued the applicable law of the Constitution and was sustained in doing so by Connecticut's Supreme Court. It was error for the court below to affirm the District Court's denial of petitioner's application for habeas corpus. The case is remanded to the Court of Appeals to be held in order to give the State opportunity, to retry petitioner, in light of this opinion, within a reasonable time. In default thereof the petitioner is to be discharged.

Reversed.

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[5] We do not deal in this case with a situation in which the record—taking all of petitioner's evidence, and the inferences reasonably to be drawn from it, in the light most favorable to him—nevertheless fails to make out a claim of coercion. Since the issue of voluntariness might fairly have gone either way on the whole of the testimony, petitioner has clearly been prejudiced by the application of an erroneous standard to his federal claim by the state trial judge in allowing the confessions to go to the jury.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1960.

Harold D. Rogers, Petitioner, v. Mark S. Richmond, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 20, 1961.]

Mr. Justice Stewart, whom Mr. Justice Clark joins, dissenting.

Although the matter is not free from doubt, I accept the Court's conclusion that both state courts gave some weight to the probable truth of the confessions in determining that they were voluntary.* But I cannot accept the proposition that the petitioner is entitled to his release by way of federal habeas corpus merely because of the state courts' failure properly to verbalize the correct Fourteenth Amendment test of admissibility. Cf. *Stroble* v. *California*, 343 U. S. 181.

The writ can be extended to Rogers only if he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241 (c)(3). See *Johnson* v. *Zerbst*, 304 U. S. 458, 465–468; *Hawk* v. *Olson*, 326 U. S. 271, 274–276. In the context of the present

*In Connecticut the jury plays no part in determining the voluntariness of a confession. Connecticut follows the orthodox rule of leaving the determination of admissibility exclusively to the trial judge. *State* v. *McCarthy*, 133 Conn. 171, 177, 49 A. 2d 594, 597; *State* v. *Guastamachio*, 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain*, 141 Conn. 694, 699, 109 A. 2d 504, 507. Compare *Stein* v. *New York*, 346 U. S. 156. If a confession is admitted, the jury is left to weigh its truthfulness as it weighs other evidence. There is no claim in this case of any error in the instructions to the jury.

case this means that the writ should be granted, if, and only if, a coerced confession was in fact admitted at the trial. See *Leyra* v. *Denno*, 347 U. S. 556. I think, as did the District Court, that in deciding that question the appropriate inquiry for the habeas corpus court is not what test of admissibility the State applied or purported to apply, but whether a confession was admitted which was in fact involuntary under Fourteenth Amendment standards.

I would, therefore, remand the case to the District Court for a plenary hearing to determine this question. Where, as here, the state trial court's determination of admissibility was at least partly affected by the impermissible factor of probable reliability, I think there can be no question of the federal court's duty to hold such a hearing. While the state court's failure to enunciate the correct standard was not itself an error of constitutional dimensions, it did make impossible the federal court's unquestioning reliance on the trial court's findings of fact. Even the most narrow view of what was said in *Brown* v. *Allen*, 344 U. S. 443, would require a plenary hearing in these circumstances.